UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 11

Alton H. Piester, LLC Case 11-CA-21531

COUNSEL FOR ACTING GENERAL COUNSEL'S CROSS-EXCEPTION AND BRIEF IN SUPPORT OF CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

Shannon R. Meares Counsel for Acting General Counsel

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 11

ALTON H. PIESTER, LLC

and

Case 11-CA-21531

DARRELL CHAPMAN, an Individual

To the Honorable, the Members of the National Labor Relations Board 1099 14th Street, NW Washington, DC 20570-0001

COUNSEL FOR ACTING GENERAL COUNSEL'S CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for Acting General Counsel cross-excepts to the supplemental decision issued by Administrative Law Judge Mary Miller Cracraft on December 30, 2010, in the above-captioned case, as follows:

I.

To the Judge's denial of Acting General Counsel's Motion in Limine and Motion to Strike Paragraphs 4 and 5 of Respondent's Amended Answer to preclude the Respondent from presenting evidence that its backpay liability ended no later than the second quarter of 2007 because it could not reinstate Darrell Chapman due to his driving record. (JD 4, L 3-12)

The grounds supporting this cross-exception are detailed in the attached brief in support of the cross-exception.

Dated at Winston-Salem, North Carolina, on the 27th day of January 2011.

Respectfully submitted,

Shannon R. Meares

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UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 11

ALTON H. PIESTER, LLC

and

Case 11-CA-21531

DARRELL CHAPMAN, An Individual

To the Honorable, the Members of the National Labor Relations Board Franklin Court Building 1099 14th Street, NW Washington, DC 20570-0001

COUNSEL FOR ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION¹

I. INTRODUCTION

The single issue presented in this case is the total amount of backpay due to Darrell Chapman as a result of his unlawful termination. In her supplemental decision, Administrative Law Judge Mary Miller Cracraft ("Judge") found that Acting General Counsel's method of computing backpay was reasonable. In addition, the Judge rejected Respondent's affirmative defense that Chapman was ineligible for reinstatement in June 2007 because of his driving record and awarded Chapman full backpay from the date of his unlawful termination until the Respondent's June 14, 2010 unconditional offer of reinstatement. On January 13, 2011,

Exhibits; and "R" refers to Respondent's Exhibits.

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¹ References are as follows: "JD" refers to the Judge's Decision; "L" refers to the line on the page of the Judge's Decision; "TR" refers to the transcript of the compliance hearing; "GC" refers to Acting General Counsel's

Respondent filed Exceptions to the Judge's Decision ("Exceptions"), contending that the Judge erred in awarding Chapman the full amount of backpay based on its asserted inability to reinstate him in June 2007 because of his driving record.²

Although the Judge's decision awards Chapman the full amount of backpay set forth in the Compliance Specification, the Judge adhered to her decision to deny Counsel for Acting General Counsel's prehearing Motion in Limine and Motion to Strike Paragraphs 4 and 5 of Respondent's Amended Answer ("Motion") to preclude Respondent from presenting evidence relating to its alleged inability to reinstate Chapman because of his driving record. In light of Respondent's Exceptions, Counsel for Acting General Counsel submits this cross-exception and asserts that the Judge erred in allowing Respondent to present evidence regarding Chapman's driving record as such evidence is barred under the doctrine of laches.

II. DISCUSSION

A. Respondent is precluded from presenting evidence regarding its inability to reinstate Chapman based on his driving record because the factual findings and conclusions of law regarding the matter of reinstatement were already decided in the underlying unfair labor practice hearing.

Prior to the compliance hearing, on October 15, 2010, Counsel for Acting General Counsel filed the above-referenced prehearing Motion arguing that Respondent should be precluded from presenting any evidence regarding its inability to reinstate Chapman based on his driving record, as factual findings and conclusions of law regarding the matter of reinstatement had already been decided in the underlying unfair labor practice hearing. (GC 1(k)) Specifically, in its Amended Answer, Respondent admits that it was aware of Chapman's driving

² Although Respondent's Exceptions are dated January 13, 2011, Respondent did not certify service of its Exceptions until January 14, 2011.

record prior to the unfair labor practice hearing. GC (1(i)) Similarly, the evidence shows that, at all times since June 2007, Respondent has taken the position that it could not reinstate Chapman based on his driving record. Particularly, during the underlying unfair labor practice hearing, Respondent's counsel questioned Chapman about his driving record, including his three traffic violations and two pre-discharge accidents. When Counsel for General Counsel objected to the line of questioning by arguing relevance, Respondent's counsel stated:

The relevance, Your Honor is that if Mr. Chapman has a sufficiently bad driving record, then there's going to be a reason not to re-employ him. And it goes to mitigation and after-acquired evidence of whether or not he can be re-employed.

Administrative Law Judge Keltner E. Locke opined that the issue may be a "matter left for the compliance stage," but, nonetheless, overruled the objection and allowed Respondent's counsel to proceed with his line of questioning.

Respondent's defense that Chapman's backpay should be tolled as of June 2007 because of his driving record is now barred by the doctrine of laches. In this regard, in *Fibreboard Paper Products Corporation*, 180 NLRB 142, 149 – 150 (1969), enfd. 436 F.2d 908 (D.C. Cir. 1970), cert denied, 403 U.S. 905 (1971), the Board held that when a respondent has knowledge of a discriminatee's misconduct prior to the alleged unfair labor practice proceeding and fails to assert that argument as a defense to the reinstatement remedy in the underlying unfair labor practice hearing, it is thereafter barred from asserting that defense in the subsequent backpay proceeding, because the defense is then untimely. Specifically, the Board noted that such a defense concerns the right to reinstatement, rather than the amount of liability, the latter of which is a proper subject for compliance. *Id*.

Similarly, in *Bob's Ambulance Service*, 183 NLRB 961 (1970), the Board granted respondent's motion to reopen the record to determine whether a discriminatee was suitable for

reinstatement based on evidence acquired immediately following the unfair labor practice proceeding. General Counsel opposed the motion asserting that the issue of suitability for reinstatement was more appropriate for the compliance proceeding. *Id.* The Board, citing *Fibreboard*, held that the suitability of reinstatement was proper for an unfair labor practice hearing because it goes to the appropriateness of the usual remedy of reinstatement. *Id.* Specifically, the Board stated that "the issue of employee misconduct which may warrant forfeiture of reinstatement goes to the remedy and not to the issue of compliance with the remedy." *Id.*

As Judge Locke afforded Respondent an opportunity to litigate the issue of reinstatement during the underlying unfair labor practice hearing, Respondent should have been precluded, based on the doctrine of laches, from raising the issue of the appropriateness of the reinstatement remedy in the compliance proceeding.

B. The Judge erred by denying Counsel for Acting General Counsel's Motion and allowing Respondent to present evidence that its backpay liability terminated in June 2007 because it allegedly could not reinstate Chapman due to his driving record.

At the compliance hearing, Counsel for Acting General Counsel's prehearing Motion was denied by the Judge based on the perceived ambiguity of Judge Locke's statement. (JD 4, L 3-4; TR 6-7) In her post-hearing brief, Counsel for Acting General Counsel sought reconsideration of the Motion. In her supplemental decision, the Judge adhered to her decision to deny the Motion. (JD 4, L 3-12) In this regard, the Judge noted that Counsel for Acting General Counsel's statement of the law was correct; however, she, nevertheless, denied the Motion asserting that: (1) it is unclear whether Respondent contends that reinstatement itself is precluded or that it must be delayed until the violations and accidents are removed from Chapman's record due to passage of time; and (2) due process requires that she hear the evidence in light of Judge Locke's

statement that the matter might be tried in the compliance proceeding. (JD 4, L 4-12). Counsel for Acting General Counsel submits that the Judge's decision to deny the Motion based on the perceived ambiguities of Respondent's affirmative defense and due process concerns is erroneous.

1. Respondent's Amended Answer asserts only that reinstatement itself is precluded, not that Chapman's reinstatement should be delayed, and, to the extent there is any ambiguity in Respondent's affirmative defense, such ambiguity should be construed against Respondent as the party asserting the defense.

In support of her decision to deny the Motion, the Judge states that it is unclear whether Respondent is asserting that reinstatement itself is precluded or whether Chapman's reinstatement must be delayed until the violations and accidents are removed from his record. (JD 4, L 3-10). To the contrary, a close review of Respondent's Amended Answer and its response to the Motion, demonstrates that Respondent only contends that Chapman's reinstatement was completely precluded as of June 2007. (GC (1)(i) and 1(l)) Moreover, to the extent that Respondent's affirmative defense is ambiguous, such ambiguity should be construed against Respondent as the party asserting the affirmative defense and should not be a basis for allowing the presentation of such evidence. Cf. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 650 (2004) (ambiguities should be construed against the promulgator).

Significantly, at no time during the compliance proceeding did Respondent assert an alternative theory that if its backpay liability failed to terminate June 2007, it should, at the very least, be tolled during the period in which Chapman's driving record affected his insurability.

No such theory is pled in its Amended Answer nor is it asserted in Respondent's response to the Motion. Moreover, no such theory was argued at hearing or in Respondent's post-hearing brief. Indeed, in its Exceptions Respondent specifically rejects any such defense. Counsel for Acting

General Counsel submits, therefore, that Respondent has now waived its right to raise a delayed reinstatement defense.

2. Respondent will not be denied due process if evidence regarding Chapman's poor driving record is disregarded.

In her supplemental decision, the Judge asserts that due process required that she allow Respondent to present evidence regarding Chapman's driving record because of Judge Locke's statement that the issue of reinstatement might be tried in the compliance proceeding. (JD 4, L 10-12) To the extent Judge Locke's remarks created any ambiguity regarding the appropriateness of litigating the issue of reinstatement during the unfair labor practice hearing, such ambiguity was minimal, at most, and his overruling of the objection gave Respondent a clear mandate to pursue the litigation of the issue.

Assuming arguendo that Judge Locke's statement created a measure of ambiguity, any ambiguity should be construed against Respondent. In this regard, the onus clearly fell on counsel, as Respondent's advocate and the promulgator of the affirmative defense, to clarify the appropriateness of litigating the defense against reinstatement in the underlying hearing. Supra, *Lutheran Heritage* (ambiguities should be construed against the promulgator). If Respondent had pursued the matter, the judge would have been forced to take an affirmative position on the record, thereby preserving, if necessary, Respondent's right to address the issue on appeal to the Board and the Court of Appeals. Respondent had the opportunity, during the unfair labor practice hearing, to cure the ambiguity by articulating its rationale for attempting to proffer evidence on the reinstatement remedy issue, but failed to do so. Respondent's lack of advocacy, therefore, deprived it of due process, not Judge Locke's statement. Respondent's failure to advocate for its client in the underlying unfair labor practice proceeding should preclude it from

now, in a supplemental compliance proceeding, litigating the appropriateness of the reinstatement remedy.

III. CONCLUSION

Based on the foregoing, the Judge erred by denying the Motion and allowing Respondent to present evidence regarding its alleged inability to reinstate Chapman, in June 2007, because of his driving record. As discussed above, this defense goes directly to the issue of reinstatement as a remedy, rather than the amount of backpay due. The facts here closely parallel those in *Fibreboard*, and Counsel for Acting General Counsel respectfully submits that Respondent has waived its right to now assert that reinstatement is inappropriate and, therefore, should be barred from presenting evidence regarding Chapman's driving record. Accordingly, Respondent's affirmative defense should be stricken from its Amended Answer and all evidence presented on this issue should be disregarded.

Dated at Winston-Salem, North Carolina, on the 27th day of January 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Exceptions and Brief in Support of Exceptions have this date been served by **Electronic Mail** upon the following parties:

Mr. Charles F. Thompson, Jr., Esq. Malone, Thompson, Summers & Ott 339 Heyward Street, Suite 200 Columbia, SC 29201 thompson@mtsolawfirm.com

Overnight mail:

Mr. Darrell Chapman 119 Doe Road Newberry, SC 29108

Dated at Winston-Salem, North Carolina, on the 27th day of January 2011.

Shannon R. Meares

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